No. 00-10666

In the Supreme Court of the United States

WILLIAM JOSEPH HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Court granted certiorari limited to the following question:

Given that a finding of "brandishing," as used in 18 U.S.C. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

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OPINION BELOW

The opinion of the court of appeals (J.A. 269-282) is reported at 243 F.3d 806.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2001. The petition for a writ of certiorari was filed on June 18, 2001, and was granted on December 10, 2001, limited to the question specified by the Court. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App, *infra*, 1a-3a.

STATEMENT

After a plea of guilty and a bench trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of distributing marijuana, in violation of 21 U.S.C. 841(a)(1), and of carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1) (1994 & Supp. V 1999). He was sentenced to time served (two days of imprisonment) on the distribution offense and to seven years of imprisonment on the firearm offense, to be followed by concurrent terms of three years of supervised release. He was also fined $3000, and ordered to pay a $200 special assessment. J.A. 255-266. The court of appeals affirmed petitioner's sentence. J.A. 269-282.

1. On April 29, 1999, an undercover law enforcement officer visited petitioner's pawn shop and bought an ounce of marijuana from petitioner. J.A. 41-47, 270; Presentence Investigation Report (PSR) ¶ 5. The officer returned the next day and bought an additional 114 grams (approximately four ounces) of marijuana. J.A. 55-56, 270. During both sales, petitioner carried a 9mm Taurus handgun in an unconcealed hip holster. J.A. 41, 55, 271. As the initial sale was concluding, the officer commented on the gun, and petitioner removed it from its holster. J.A. 49. Petitioner told the officer that it "was an outlawed firearm because it had a high-capacity magazine." J.A. 49, 61, 271. Petitioner showed the officer the ammunition and said that his homemade bullets could pierce a police officer's armored jacket. J.A. 49-50, 60-61, 271.

2. In August 1999, a federal grand jury in the Middle District of North Carolina returned a superseding indictment charging petitioner with two counts of distribution of marijuana, in violation of 21 U.S.C. 841(a)(1), and two counts of carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (1994 & Supp. V 1999). J.A. 4-6. Each of the firearm counts alleged that petitioner, "during and in relation to a drug trafficking crime * * * , that is, distribution of marijuana, * * * did knowingly carry a firearm, that is, a 9mm Taurus semiautomatic pistol." J.A. 4, 5. Petitioner pleaded guilty to one marijuana distribution charge, and the court found him guilty of the associated firearm charge after a bench trial. J.A. 22, 164, 271. The other two counts were dismissed on the government's motion. J.A. 22-23, 271.

Under the United States Sentencing Guidelines, petitioner's sentences for the distribution count and for the firearm count were determined independently, because Section 924(c)(1) requires a mandatory consecutive sentence on the firearm count. See 18 U.S.C. 924(c)(1) (1994 & Supp. V 1999); Guidelines §§ 3D1.1(b), 5G1.2(a); PSR ¶ 15. The PSR determined that petitioner was responsible for the equivalent of 534 grams of marijuana, which resulted in a base offense level of eight for the distribution count. PSR ¶¶ 12, 16; see Guidelines § 2D1.1(c)(16).[1] That offense level, together with petitioner's criminal history category of I, yielded an applicable Guidelines sentencing range for the distribution count of zero to six months of imprisonment. PSR

[1] The PSR found that petitioner was responsible for marijuana, opium, and diazepam that he sold on occasions other than the offense of conviction, in addition to the 114 grams of marijuana involved in that offense. PSR ¶¶ 4-10.

¶ 42. Under Guidelines § 2K2.4(a)(2), petitioner's sentence for the firearm count was "the minimum term of imprisonment required by statute," which the PSR indicated was seven years of imprisonment. PSR ¶ 41. Section 924(c)(1)(A)(i) provides for a minimum sentence of five years (and an implied maximum sentence of life imprisonment) for any person who uses or carries a firearm during and in relation to a drug-trafficking crime or who possesses a firearm in furtherance of any such crime. 18 U.S.C. 924(c)(1)(A)(i) (1994 & Supp. V 1999). Section 924(c)(1)(A)(ii) provides that the minimum sentence shall be not less than seven years "if the firearm is brandished." 18 U.S.C. 924(c)(1)(A)(ii) (1994 & Supp. V 1999).

At sentencing, the district court rejected petitioner's arguments that he should be subject to a five-year, rather than a seven-year, minimum sentence on the firearm count. Petitioner argued that his display of the gun did not constitute "brandish[ing]" within the meaning of Section 924(c)(1)(A)(ii). J.A. 199-202, 212-233. Petitioner also argued that brandishing is, as matter of statutory construction, an element of a separate offense, which the government was required to, but did not, allege in the indictment and prove beyond a reasonable doubt at trial. J.A. 202-205, 222. In determining whether petitioner "brandished" the firearm, the district court stated that it would not consider petitioner's "conversation about the gun * * * and the bullets" when petitioner showed the weapon to the officer. J.A. 221. It also noted that brandishing includes "carrying an exposed weapon during the [drug] transaction." J.A. 233. Applying that definition, the court found that, although it was a "close question," petitioner's conduct constituted brandishing under Section 924(c) because petitioner carried the gun openly

during drug transactions "to intimidate people * * * during his illegal business." J.A. 225-227. The court also observed that, "considering all of the aspects of this case," "a sentence of seven years is appropriate." J.A. 247. Although the court declined to say definitively that it would reimpose that sentence if petitioner's arguments on brandishing succeeded on appeal, the court made clear that it might do so. See J.A. 244-247, 274.

3. The court of appeals affirmed petitioner's sentence. J.A. 269-282. The court rejected petitioner's renewed argument that, as a matter of statutory construction, brandishing is an element of an aggravated offense defined by Section 924(c)(1)(A)(ii), and that brandishing must therefore be charged in the indictment and proved at trial beyond a reasonable doubt before it may form the basis for a mandatory minimum sentence. J.A. 270, 272-281. The court concluded, based on its "[e]xamination of the statutory language, structure, context, and history," that "'brandished' is a sentencing factor, not an element of the offense." J.A. 270.

The court of appeals also rejected petitioner's claim that the district court's imposition of a seven-year mandatory minimum sentence was unconstitutional under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). J.A. 273-276. In *Apprendi*, which was decided while petitioner's appeal was pending, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The court of appeals held that *Apprendi* does not apply to petitioner's case because, under Section 924(c)(1)(A)(ii), a finding of

brandishing only increases the mandatory minimum sentence and does not "increase[] the penalty . . . beyond the prescribed statutory maximum." J.A. 273. The court of appeals concluded that the district court's treatment of brandishing as a sentencing factor that need not be charged in the indictment or proved beyond a reasonable doubt at trial was constitutional under *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), because Section 924(c)(1)(A)(ii) "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of [brandishing] a firearm." J.A. 273 (quoting *McMillan*, 477 U.S. at 87-88).

SUMMARY OF ARGUMENT

I. As a matter of statutory interpretation, Section 924(c)(1)(A) makes "brandishing" a sentencing factor, not an element of the offense. The structure of Section 924(c)(1)(A) suggests that conclusion, by creating a single offense of using or carrying a firearm during and in relation to a drug trafficking crime followed by three numbered subsections that increase the minimum sentence, within the maximum of life imprisonment, based on the manner in which the offense is committed. As the Court noted in *Jones* v. *United States*, 526 U.S. 227 (1999), such a structure has the look of a single offense, with three separate sentencing provisions.

The Court in *Jones* went on to find that the carjacking offense at issue in that case was better construed to create elements rather than sentencing factors, but the pivotal considerations in *Jones* are absent here. Unlike the carjacking statute, the sentencing provisions in Section 924(c)(1)(A) do not raise the maximum, but only increase the minimum; they are activated by facts ("brandishing" and "discharging") that only incrementally enhance the harm in injecting a gun into a drug or

violent crime; and the mandatory increases themselves (*i.e.*, from five to seven or ten years) are not steep. The *Jones* Court relied heavily on the traditional treatment of the factors at issue there (bodily injury, death) as elements in other federal statutes. Here, no other relevant federal statute makes "brandishing" or "discharging" an element.

In adopting an "elements" interpretation, *Jones* placed weight on the doctrine that statutes should be interpreted to avoid serious constitutional questions. In this case, there is no ambiguity that would justify resort to that doctrine. And the constitutionality of a statute that raises the minimum sentence within the range already available to the sentencing judge is established by *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). Congress was entitled to rely on that precedent in framing Section 924(c)(1)(A).

II. The Constitution does not require that "brandishing" be treated as an offense element that must be charged in the indictment and proved beyond a reasonable doubt. In *McMillan*, the Court upheld the constitutionality of a state statute in which the mandatory minimum sentence was increased by a judge's finding by a preponderance of the evidence that a defendant had a visible firearm. That holding is correct, and it is not called into question by *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

Legislatures may legitimately decide that judicial discretion in sentencing should be controlled by dictating the precise weight that courts should accord to particular sentencing factors within the authorized range. Legislatures may also validly conclude that assigning the determination of those factors to the judge, rather than the jury, furthers significant interests. Judicial determination of sentencing factors

enables effective appellate review; avoids the complications of submitting multiple findings to grand and petit juries; and prevents the unfairness that may result when a defendant is compelled at trial to contest both the commission of the crime as well as the way in which he committed the crime.

Apprendi's constitutional principles are not undermined by mandatory minimum sentencing provisions. *Apprendi*'s rule—that findings by a court, other than recidivism, cannot increase the maximum statutory sentence—is designed to prevent erosion of the Fifth and Sixth Amendment rights to a jury verdict beyond a reasonable doubt. But mandatory minimum sentencing provisions do not erode or circumvent those rights. Rather, they restrict judicial discretion within the existing range. The jury verdict still determines the facts that establish the maximum available sentence.

Historical sentencing practices afford no basis for declaring mandatory minimum sentencing provisions to be unconstitutional. And policy considerations favor preserving legislative flexibility to enact such provisions. *Apprendi* itself provides substantial protection against any efforts to evade the jury trial and reasonable-doubt requirements. An extension of *Apprendi* to findings *within* the authorized range would only cast a potential constitutional cloud over legislative efforts to reform sentencing.

Finally, whether or not this Court would agree with *McMillan* today, principles of stare decisis weigh heavily against overruling it. Legislatures have relied on this Court's constitutional ruling in *McMillan* for 16 years. That decision should be reaffirmed.

ARGUMENT

I. SECTION 924(c)(1)(A) DEFINES A SINGLE FEDERAL CRIME WITH THREE SENTENCING PROVISIONS

Within broad constitutional limits, "the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994). In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that other than a prior conviction, a factor that increases the *maximum* statutory sentence must be treated as an element for constitutional purposes. In *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986), the Court held that a factor that increases a mandatory *minimum* sentence need not be treated as an element. Within those guidelines, whether a particular factor in a federal criminal statute is an offense element or a sentencing factor is dictated primarily by congressional intent, as discerned from the "language, structure, subject matter, context, and history" of the provision. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998).

Section 924(c)(1)(A) increases the mandatory minimum sentence for using or carrying a firearm during and in relation to a drug trafficking offense when the firearm is brandished or discharged. Petitioner contends (Pet. 6) that this Court's decision in *Jones* v. *United States*, 526 U.S. 227 (1999), construed an "indistinguishable" statute to create elements, and so the same conclusion must follow here with respect to brandishing and discharging. *Jones*, however, reached its holding where the statutory findings raised the *maximum* sentence; where the findings duplicated factors that are made elements in other federal statutes;

and where a sentencing-factor interpretation would have created a serious constitutional question, which the Court avoided "out of respect for Congress, which we assume legislates in the light of constitutional limitations." 526 U.S. at 239-240, 251-252. Here, in contrast, the factors at issue raise only the *minimum* sentence, they are classic matters for sentencing, and they appear in a statutory scheme enacted in light of this Court's decision in *McMillan*, which *approves* the constitutionality of a sentencing-factor approach for mandatory minimums. *Jones* does not control this case, and the relevant evidence supports the court of appeals' conclusion that "brandishing," as a matter of statutory construction, "sets forth a sentencing factor that need not be charged in the indictment." J.A. 281.

A. Section 924(c)(1)(A)'s Language And Structure Indicate That Brandishing And Discharging Are Sentencing Factors

Section 924(c)(1)(A) begins with a principal paragraph that defines, as relevant here, "two distinct conduct elements— * * * the 'using and carrying' of a gun and the commission of a [predicate crime]." *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999) (interpreting similar language in prior version of Section 924(c)(1)); see *Castillo* v. *United States*, 530 U.S. 120, 124 (2000) (same). The paragraph concludes with a phrase using the word "shall," followed by a subsection stating that the offense is punishable by "a term of imprisonment of not less than 5 years," and two additional subsections that raise the minimum sentence when the gun was "brandished" or "discharged." That structure reflects Congress's intent to define a single offense—using or carrying a firearm during and in relation to a drug trafficking crime (or a crime of violence)—

punishable by life in prison, with mandatory minimum sentences that vary in severity depending on the way in which the offense is carried out.

This Court noted in *Jones* v. *United States*, 526 U.S. at 232, when describing the federal carjacking statute, 18 U.S.C. 2119, that such a structure on its face "suggest[s] that the numbered subsections are only sentencing provisions." See also *Castillo*, 530 U.S. at 125 (in *Jones*, the Court noted that "the structure of the carjacking statute—a 'principal paragraph' followed by 'numbered subsections'—makes it 'look' as though the statute sets forth sentencing factors"). That impression is reinforced here by the fact that the maximum for *any* violation of Section 924(c) is always life imprisonment. As the court of appeals explained, the "brandishing" and "discharge" subsections do not increase the maximum sentence, but "operate[] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of [brandishing] a firearm." J.A. 273 (quoting *McMillan*, 477 U.S. at 87-88).

The Court in *Jones* discounted the initial impression conveyed by the structure of the carjacking statute because the additional facts in the subparagraphs of Section 2119 ("injury, death") not only triggered "steeply higher penalties," but also "seem[ed] quite as important as the elements in the principal paragraph." 526 U.S. at 233. In Section 924(c), however, the basic evil is addressed in the principal paragraph. When Congress passed Section 924(c), "it was no doubt aware that drugs and guns are a dangerous combination," which "creates a grave possibility of violence and death," whether or not the gun is deployed as a weapon. *Smith* v. *United States*, 508 U.S. 223, 240 (1993). The acts of "brandishing" and "discharging" do not pose

qualitatively different dangers from the underlying prohibited conduct; they merely magnify the inherent threat of violence that is always present in the volatile mixture of guns and drugs.[2]

Furthermore, the findings under Section 924(c) do not result in "steeply higher penalties." *Jones*, 526 U.S. at 233. The maximum sentence for carjacking increases from 15 years of imprisonment to 25 years if the carjacking results in serious injury, and to life imprisonment if it results in death. See also *Castillo*, 530 U.S. at 131 (taking into account added severity of a sentence increase from five to ten years for use of a short-barreled gun and to thirty years for use of a machinegun). Here, by contrast, *all* violations of Section 924(c) are punishable by life imprisonment. A finding that the firearm was brandished increases the minimum sentence by two years—from five years to seven—and a finding that the firearm was discharged increases the minimum three more years—to ten years. Those increases are not steep and do not affect the "available penalty" at all: a defendant may be sentenced to seven, ten, or many more years in prison without a finding that he brandished or discharged a firearm. J.A. 281.

In *Jones*, even taking account of the nature and sentencing consequences of "serious bodily injury" and "death" under the carjacking statute, and considering other structural features of that provision, the Court still found that "[t]he text alone does not justify any

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[2] Unlike the carjacking statute, Congress addressed the *harms* resulting from a violation of Section 924(c) in a separate provision. 18 U.S.C. 924(j) (Supp. V 1999) ("[a] person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm" shall be punished for murder or manslaughter, depending on the nature of the killing).

confident inference" about congressional intent. 526 U.S. at 234. Here, in contrast, the structure of Section 924(c) conveys a strong first impression that "brandishing" and "discharge" are sentencing factors, and the context reinforces that impression. As discussed below, other relevant principles of statutory construction confirm that interpretation.

B. Brandishing And Discharging A Firearm Are Traditional Sentencing Factors

In *Jones*, the Court stated that "[i]f a given statute is unclear about treating * * * a fact as element or penalty aggravator, it makes sense to look at what other statutes have done." 526 U.S. at 234. For the carjacking statute, that inquiry revealed that Congress had frequently treated bodily injury and death as elements of various crimes. *Id.* at 234-236; see also *Castillo*, 530 U.S. at 126-127 (examining federal statutes making type of weapon an offense element). Here, Congress's traditional treatment of brandishing and discharging supports the conclusion that they are sentencing factors. "Traditional sentencing factors often involve * * * special features of the manner in which a basic crime was carried out." *Castillo*, 530 U.S. at 126. Both brandishing and discharging are ways of carrying out the basic crime of using or carrying a firearm during and in relation to a drug trafficking crime or crime of violence.

The Court in *Castillo* specifically stated that the fact "that the defendant * * * brandished a gun" is a traditional sentencing factor. 530 U.S. at 126. That observation is confirmed by a wide variety of sources. See *McMillan*, 477 U.S. at 90-91 ("visible possession" of firearm is a traditional sentencing consideration); Report of the Twentieth Century Fund Task Force

on Criminal Sentencing (Task Force Report), *Fair and Certain Punishment* 57 (1976) ("brandish[ing] a weapon" is factor affecting the appropriate sentence for the crime of burglary); Pub. L. No. 104-208, § 203(e)(2)(E)(ii), 110 Stat. 3009-567 (1996) (directing Sentencing Commission to amend Sentencing Guidelines for alien smuggling to "impose an appropriate sentencing enhancement on a defendant who * * * brandishes a firearm"); Guidelines § 2A2.2(b)(2)(C) (brandishing a firearm increases offense level for aggravated assault); *id.* § 2B3.2(b)(3)(A)(iii) (same for extortion). The same is true of discharging a firearm. *Id.* § 2A2.2(b)(2)(A) (discharging a firearm increases offense level for aggravated assault); *id.* § 2B3.2(b)(3)(A)(i) (same for extortion); *id.* § 5K2.6 ("discharge of a firearm might warrant a substantial sentence increase").

Against that background, there is no evidence to justify treating brandishing and discharging as "elements" in Section 924(c). No federal statute defines "brandishing" a firearm as a separate offense or element of an offense.[3] Petitioner cites (Br. 13) four

[3] The only provision petitioner cites (Br. 13 n.5) as evidence that "Congress has traditionally treated brandishing as an element of the offense" is the definition of the predicate offense of "assault with intent to commit rape" under the federal "three strikes" statute, which does not make brandishing the element of any federal offense. See 18 U.S.C. 3559(c)(2)(A) and (2)(F)(i) (1994 & Supp. V 1999). To the extent that Section 3559(c) is relevant at all to the question in this case, a more pertinent provision is Section 3559(c)(2)(D), which defines the predicate offense of "firearms use" as "an offense that has as its elements those described in section 924(c) or 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon." That definition indicates that Congress did not construe the elements "described in section 924(c)" to include brandishing or discharging.

statutes that make it a federal offense to "discharge" a firearm in various protected locations, but none bears any resemblance in language or structure to Section 924(c)(1)(A).[4] Those provisions—which use traditional offense-defining language and do not separate "discharge" from other elements by the word "shall" or numbered subsections—demonstrate only that Congress knows how to make discharging an offense element when it wishes.

Petitioner also cites (Br. 13-14; see Pet. App. E, F) state statutes that treat brandishing and discharging as offense elements. Although in *Jones* the Court relied in part on state robbery statutes, it also noted that "state practice is not * * * direct authority for reading" a federal statute, 526 U.S. at 237, and it considered the state statutes only to confirm its conclusion (based on examination of federal statutes) that, "in treating serious bodily injury as an element, Congress would have been treading a well-worn path." *Ibid.* That some "States have formulated different statutory schemes to punish armed felons is merely a reflection of our federal system." *McMillan*, 477 U.S. at 90. In the absence of directly relevant federal statutes, there is no reason to assume that Congress followed the practice of those States when it enacted Section 924(c)(1)(A).

Amici Cato Institute et al., claim that brandishing is a "typical * * * crime in Anglo-American history," but they acknowledge that the common-law offenses of

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[4] See 2 U.S.C. 167d ("It shall be unlawful to discharge any firearm" at the Library of Congress.); 18 U.S.C. 922q(3)(A) (1994 & Supp. V 1999) ("it shall be unlawful for any person * * * to discharge * * * a firearm" in a school zone); 40 U.S.C. 13j ("It shall be unlawful to discharge any firearm" in the Supreme Court building.); 40 U.S.C. 193f(a)(1)(B) ("It shall be unlawful for any person * * * to discharge any firearm" in United States Capitol.).

"affray" and "carrying arms 'malo anime'" on which they rely involved fighting in public places or carrying firearms with the intent to commit violent crimes. Br. 24-25 n.7. Brandishing a firearm was not an element of those offenses; it was only one way "in which [the] basic crime [could be] carried out." *Castillo*, 530 U.S. at 126.[5]

C. The Legislative History of Section 924(c) Confirms That Brandishing And Discharging Are Sentencing Factors

The evolution of Section 924(c) also suggests that Congress intended brandishing and discharging to be sentencing factors. As the court of appeals explained (J.A. 279-280), the bill initially passed by the House of Representatives deleted the "uses or carries" language from the opening paragraph of Section 924(c)(1) and added three subsections that provided for escalating fixed sentences for possessing, brandishing, or discharging a firearm. H.R. 424, 105th Cong., 2d Sess. (1998).[6]

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[5] Amici also argue (Cato Br. 17, 36) that the definition of "brandish" in Section 924(c)(4), which requires that the defendant "display all or part of the firearm" or "otherwise make the presence of the firearm known to another person, in order to intimidate that person," suggests that brandishing includes "specific intent" and therefore Congress must have meant it to be an element. The inclusion of an identical definition of brandishing in the Sentencing Guidelines, see Guidelines § 1B1.1, comment. (n.1(c)), makes clear that Congress's use of the phrase "in order to intimidate" does not mean that brandishing is necessarily an offense element.

[6] As passed by the House, H.R. 424 provided:

> (1) A person who, during and in relation to any crime of violence or drug trafficking crime * * * for which the person may be prosecuted in a court of the United States—

The statute ultimately enacted is quite different. It retains the "uses or carries" language in the principal paragraph, while adding an additional prohibition on possessing a firearm in furtherance of the predicate offenses. The principal paragraph is followed by three subsidiary clauses that relate to sentencing. Unlike the initial House bill, the statute as enacted shows Congress's intent to define the offense in the principal paragraph and then to provide for minimum sentences that increase in severity where the offense involves more dangerous conduct. See J.A. 279 ("In the final bill, however, Congress decided not to include brandishing or discharging as actus reus elements of the offenses proscribed in the initial principal paragraph.").

Petitioner's citations (Br. 20-22) to the legislative history refer primarily to the bill initially passed by the House, which differed in critical respects from the statute ultimately passed. In addition, the citations do not directly discuss "the issue of offense elements versus sentencing factors" and are therefore of little significance in resolving that issue. *Jones*, 526 U.S. at 239. In any event, statements by members of Congress referring to "mandatory minimum sentences" (see Pet. Br. 21-22) do not support petitioner's reading of Section 924(c) but instead "indicate[] that Congress viewed the subsections as penalty enhancements." *United States*

> (A) possesses a firearm in furtherance of the crime, shall * * * be sentenced to imprisonment for 10 years;
>
> (B) brandishes a firearm, shall * * * be sentenced to imprisonment for 15 years; or
>
> (C) discharges a firearm, shall * * * be sentenced to imprisonment for 20 years.

v. *Barton*, 257 F.3d 433, 443 (5th Cir. 2001), cert. denied, 122 S. Ct. 905 (2002).

Asserting that "under the earlier version of § 924(c)(1), any type of use, including brandishing and discharging, was an element of the offense," petitioner argues (Br. 15-16) that "the legislative history gives no indication that Congress intended to convert brandishing and discharging from offense elements to mere sentencing factors." But brandishing and discharging were never distinct "elements" of Section 924(c). In *Bailey* v. *United States*, 516 U.S. 137, 148 (1995), the Court defined "use" under the former version of Section 924(c)(1) to "include[]" brandishing or firing a firearm. The statutory element at issue, however, was "use." See *Rodriguez-Moreno*, 526 U.S. at 280. Brandishing and discharging were merely two of many ways (not specified in the statute) in which a defendant could "use" a firearm. See *Bailey*, 516 U.S. at 148 (in addition to brandishing and firing, "use" also includes "displaying, bartering, [or] striking with" a firearm). There is therefore no support in the evolution of Section 924(c) for finding brandishing and discharging to be anything other than sentencing factors within the already-available range. *McMillan*, 477 U.S. at 87-88.

D. Neither The Rule Of Lenity Nor The Doctrine Of Constitutional Doubt Applies Here

Petitioner's reliance (Br. 24-25) on the rule of lenity is misplaced. The rule of lenity applies only if there is such a "grievous ambiguity or uncertainty" in a statute that, "after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138, 139 (1998) (internal quotation marks and ellipsis omitted). As shown above, the

language, structure, subject matter, and history of Section 924(c) reveal Congress's intention to define a single crime of using or carrying a firearm, with three alternative statutory minimum sentences depending on the manner in which the offense is committed. The rule of lenity accordingly has no application.

Petitioner also argues that brandishing and discharging must be treated as offense elements because a contrary construction of Section 924(c)(1)(A) "would raise grave and doubtful questions about the statute's constitutionality." Pet. Br. 25-26. Like the rule of lenity, however, the "canon of constitutional avoidance has no application in the absence of statutory ambiguity." *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001); see *Almendarez-Torres*, 523 U.S. at 238. Equally important, there is no grave doubt under current law about the constitutionality of construing brandishing and discharging to be sentencing factors. In *Jones*, the Court found that its cases suggested a constitutional principle (later adopted in *Apprendi*) that facts that raise the *maximum* statutory sentence must be alleged in an indictment and proved to the jury beyond a reasonable doubt. *Jones*, 526 U.S. at 243 n.6; *Apprendi*, 530 U.S. at 476. But the sentencing-factor interpretation of Section 924(c)'s mandatory *minimum* provisions is constitutional under this Court's holding in *McMillan*.

Petitioner erroneously contends (Br. 26) that the canon of constitutional doubt still applies because *Apprendi* casts doubt on the continued validity of *McMillan*. But *Apprendi* did not overrule *McMillan*, 530 U.S. at 487 n.13. And when Congress enacted the amendments to Section 924(c), see Pub. L. No. 105-386, 112 Stat. 3469 (1998), it was entitled to rely on *McMillan*'s express constitutional holding in making

brandishing and discharging sentencing factors. There is therefore no reason for this Court to assume that Congress would have sought to avoid the constitutional question that petitioner now raises.

II. THE CONSTITUTION DOES NOT REQUIRE THAT ANY FACT THAT INCREASES A DEFENDANT'S STATUTORY MANDATORY MINIMUM SENTENCE BE ALLEGED IN THE INDICTMENT AND PROVED BEYOND A REASONABLE DOUBT AT TRIAL

In *McMillan*, this Court upheld the constitutionality of a sentencing provision under which a person convicted of a specified felony was subject to a mandatory minimum penalty of five years of imprisonment if the sentencing judge found, by a preponderance of the evidence, that the person visibly possessed a firearm while committing the offense. 477 U.S. at 80-94. The Court held that due process did not require the State to treat visible possession as an element of the offense or to prove its existence beyond a reasonable doubt. *Id.* at 84-93. The Court also held that the Sixth Amendment did not require that visible possession be found by the jury at trial. *Id.* at 93. The Court explained that the provision "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Id.* at 87-88.

Petitioner suggests (Br. 7, 29) that *Apprendi* effectively overruled *McMillan* because the *Apprendi* opinion cited with approval earlier opinions of some Justices referring to "facts that alter the congressionally pre-

scribed range of penalties to which a criminal defendant is exposed," see 530 U.S. at 490 (citing *Jones*, 526 U.S. at 253 (Scalia, J., concurring)), or "facts that increase the prescribed range of penalties to which a criminal defendant is exposed," *ibid.* (quoting *Jones*, 526 U.S. at 252-253 (Stevens, J., concurring)). While the Court in *Apprendi* "limit[ed]" *McMillan*'s holding to "cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict," it expressly declined to reconsider *McMillan*. 530 U.S. at 487 n.13. The Court's opinion in *Apprendi* repeatedly states that its holding applies to facts that increase the potential penalty beyond the prescribed statutory maximum. *Id.* at 469, 476, 490, 494 & n.19, 495. With respect to the different issue here, *McMillan* correctly determined that mandatory minimum sentencing provisions are constitutional, and *McMillan*'s holding should be reaffirmed.

A. Mandatory Minimum Sentencing Provisions Serve Legitimate Legislative Purposes

1. *The Legislature's Authority Over Sentencing Includes Specification Of Mandatory Minimum Penalties*

Over time, sentencing practices in this country have changed with shifting philosophies about the appropriate function of punishment and the institutions best equipped to set it for a given crime. Early in the Nation's history, legislatures generally favored fixed or mandatory sentences. Then, Congress and the state legislatures committed sentencing primarily to judges, entrusting them with discretion to determine the appropriate sentence within broad statutory limits. The legislatures in such regimes did not typically provide detailed criteria, or criteria of any kind, to restrict the

sentencing judge's exercise of that discretion. Later, with a shift in sentencing philosophy in favor of rehabilitation, some legislatures adopted indeterminate sentencing schemes in which the actual period of imprisonment was left largely to parole boards and other officials outside of the courts.[7]

"But more recently the pendulum has swung back." *Payne* v. *Tennessee*, 501 U.S. 808, 820 (1991). Legislatures, dissatisfied with regimes that left unguided discretion either to judges or parole boards and doubtful about the rehabilitative potential of imprisonment, have increasingly enacted provisions that "provided for very precise calibration of sentences, depending upon a number of factors." *Ibid.* By such provisions, the legislature exercised its paramount role to establish sentencing policy. *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989) ("the scope of judicial discretion with respect to a sentence is subject to congressional control").

The recent legislative efforts to recapture control over the sentencing process largely respond to significant variations in the sentences imposed on similarly situated defendants under the indeterminate sentencing regime. In the federal system, the disparities were compounded by the complete absence, as a practical matter, of appellate review of a sentence within statutory limits. *Dorszynski* v. *United States*, 418 U.S. 424,

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[7] The history of sentencing practices in this country is described in detail in *Mistretta* v. *United States*, 488 U.S. 361, 364-365 (1989); *Bullington* v. *Missouri*, 451 U.S. 430, 444 & n.16 (1981); *United States* v. *Grayson*, 438 U.S. 41, 45-48 (1978); *Williams* v. *New York*, 337 U.S. 241, 246, 247-249 (1949); Task Force Report 79-102; K. Stith & J. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 9-37 (1998); A. Campbell, *Law of Sentencing* §§ 1:2, 1:3 (2d ed. 1991).

431 (1974). Beginning in the 1970s, those disparities became the subject of increasing criticism. See A. Campbell, *Law of Sentencing* § 1:3, at 9-10 (2d ed. 1991); P. Hoffman & M. Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 Hofstra L. Rev. 89 (1978); *e.g.*, Task Force Report 3-9; American Friends Service Committee, *Struggle for Justice* (1971). As a result, Congress and most States reexamined their sentencing systems and enacted a variety of sentencing reforms.

The most prominent effort was the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, which created the United States Sentencing Commission and Guidelines. But another popular sentencing reform was increased use of mandatory minimum prison terms. See Campbell, *supra*, § 1:3, at 13; *id.* §§ 4:2, 4:5; Task Force Report 16; K. Stith & J. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts*, 123 (1998). These laws required mandatory minimum prison terms based on specified aggravating factors, such as repeat offender status, use of a firearm or other dangerous weapon during the offense, the particular vulnerability of the victim, and the amount of drugs involved in narcotics offenses. See *id.* at 123, 210 n.38; G. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Calif. L. Rev. 61, 69, 70-71 & nn.37-48 (1993); S. Shane-DuBow, et al., *Sentencing Reform in the United States: History, Content, and Effect* (1985). Legislatures thus began to use mandatory minimums as a mechanism to regain control over judicial sentencing discretion.[8]

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[8] See, *e.g.*, 18 U.S.C. 924(c)(1)(A)(ii) and (iii) (1994 & Supp. V 1999); 21 U.S.C. 848(a); Ala. Code § 13A-5-6(a)(4) and (5) (1994);

As generally formulated, mandatory minimum sentencing systems are an integral aspect of the sentencing process, not of the definition of crimes. The provisions do not expose defendants to any punishment that could not already have been imposed by a sentencing judge exercising unrestricted discretion. When the legislature commits sentencing to the discretion of the courts, it expects that judges will consider a variety of facts in order to calibrate the punishment to the conduct and character of the offender. See *United States* v. *Grayson*, 438 U.S. 41, 46 (1978); *Williams* v. *New York*, 337 U.S. 241 (1949). Those facts can have quite definite consequences for a defendant, as in *Williams* where the judge's consideration of the defendant's prior record led him to reject the jury's recommendation of life imprisonment and elevate the defendant's sentence to death. If a particular sentencing judge uniformly imposed a minimum sentence of seven years on defendants who brandished firearms (rather than merely carrying them or using them in a less dangerous way), that practice would not redefine the crime for which the sentences were imposed or require that the fact of brandishing be charged in the indictment and proved at trial beyond a reasonable doubt. Nor would a sentencing factor be transformed into an "element" if sentencing judges, after conducting a survey that revealed that most judges imposed such a minimum sentence, agreed that

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id. § 13A-12-231 (Supp. 2000); Alaska Stat. § 12.55.125(a) and (b) (Lexis 2000); Del. Code Ann. tit. 16, § 4751(d) (1995); D.C. Code Ann. § 22-4502(a)(2) and (c) (2001); Fla. Stat. Ann. § 775.087(2)(a)(2) and (3) (West 2000 & Supp. 2002); Minn. Stat. Ann. § 609.11 (1987 & Supp. 2002); Mo. Ann. Stat. § 558.018 (West 1999); N.J. Stat. Ann. § 2C:43-6g (West 1995); N.D. Cent. Code § 12.1-32-02.1 (1997 & Supp. 2001); 18 Pa. Cons. Stat. Ann. §§ 6314, 7508 (West 2000); 42 Pa. Cons. Stat. Ann. § 9712(a) (West 1998).

each judge would follow the general practice. See Campbell, *supra*, § 1:3, at 13-14 (discussing experimentation with voluntary sentencing guidelines in the 1970s).

Likewise, when the legislature "simply [takes] one factor that has always been considered by sentencing courts to bear on punishment * * * and dictate[s] the precise weight to be given that factor," it is not creating a new crime, but is providing "additional guidance" to the sentencing court. *McMillan*, 477 U.S. at 89-90, 92. The fact that the sentencing process becomes more transparent and uniform does not transform the consideration of a sentencing factor into an element of a distinct offense. See *Witte* v. *United States*, 515 U.S. 389, 401-402 (1995).

2. *The Legislature May Reasonably Assign Mandatory Sentencing Factors To The Courts*

There are valid policy reasons for a legislature to require uniform treatment of a particular sentencing factor without also treating that fact as an element of the offense that must be alleged in the indictment and found by the jury at trial.

First, because fact-finding by a jury is less susceptible to appellate review than fact-finding by a court, requiring jury fact-finding could undermine the legislature's goal of increased control over the punishment process. Effective appellate review of jury determinations presents practical difficulties because there is normally no way for the jury to place on the record the reasons for its collective decision. See *Chaffin* v. *Stynchecombe*, 412 U.S. 17, 28 n.14 (1973). In addition, under double jeopardy principles, the government may not appeal a jury determination that there is insufficient evidence of a fact that is deemed an element of the

offense. See *United States* v. *Scott*, 437 U.S. 82, 91 (1978). The unavailability of government appeals may be particularly problematic given the evidence that juries may engage in nullification in order to avoid perceived harsh results required by mandatory sentencing provisions. See A. Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 Yale L.J. 1775, 1783-1784 (1999). But government appeals of judicial sentencing determinations are permissible, and this Court has noted that appellate review "should lead to a greater degree of consistency in sentencing." *United States* v. *DiFrancesco*, 449 U.S. 117, 143 (1980).

Second, a rule that requires that all facts that increase the mandatory minimum punishment be treated as elements of the offense could render indictments unwieldy and could unnecessarily complicate trials. A wide array of facts bears on the appropriate sentence, see, *e.g.*, *Williams*, 337 U.S. at 246, and a legislature might properly determine that any number, or combination, of those facts warrant imposition of a mandatory minimum term. It would strain practicality, and serve no useful purpose, to require that all of those facts, even those that are collateral to guilt, be included in the indictment and proved to a jury at trial.

Finally, requiring jury determinations of facts that bear only on the applicability of mandatory minimum punishment could unnecessarily prejudice defendants. "A defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved." *Monge* v. *California*, 524 U.S. 721, 729 (1998); see also *Almendarez-Torres*, 523 U.S. at 234-235. When a fact has no effect other than to limit the sentence that may be imposed *within* the range otherwise specified by the

legislature, "fairness [may] call[] for defining [that] fact as a sentencing factor." *Monge*, 524 U.S. at 729. There is no sufficient reason to subject the government to the burden and expense of bifurcated trials in order to avoid the risk of that unfairness.

B. The Constitutional Values Served by *Apprendi* Do Not Apply To Mandatory Minimum Sentencing Provisions

In *Apprendi*, this Court held, as a matter of constitutional law, that other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The constitutional values that animate *Apprendi* are not infringed by mandatory minimum sentencing provisions.

The rule announced in *Apprendi* protects against legislative circumvention of the Sixth Amendment right to trial by jury, see *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and the due process requirement of proof beyond a reasonable doubt, see *In re Winship*, 397 U.S. 358, 364 (1970). *Apprendi*, 530 U.S. at 482-483; see also *Jones*, 526 U.S. at 243. If the legislature could provide for judicial fact-finding by a preponderance of the evidence of facts that increase the *maximum* punishment beyond that authorized by the jury's verdict, then the legislature could diminish the jury's role to one of "low-level gatekeeping," *Jones*, 526 U.S. at 243-244, and evade *Winship*, *id.* at 243. In federal cases, such a rule would also bypass the grand jury's role in finding probable cause.

None of those dangers is presented by a provision increasing the *minimum* punishment within the authorized range. Those provisions merely result in "a specific sentence *within the range* authorized by the

jury's finding that the defendant is guilty of a particular offense." *Apprendi*, 530 U.S. at 494 n.19. They do not empower the sentencing judge to impose any punishment beyond the term authorized by the jury's verdict. Because facts that increase only the required minimum punishment do not increase the authority of the sentencing judge at the expense of the jury, the legislature's assignment of the finding of those facts to the judge cannot "ero[de] * * * the jury's function" or reduce the jury's role to "low-level gatekeeping" (*Jones*, 526 U.S. at 244). Rather, the jury retains its critical function of "determin[ing] those facts that determine the maximum sentence the law allows," *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring).

a. *Sixth Amendment.* The jury trial right protects "against the corrupt or overzealous prosecutor and against the compliant, biased, and eccentric judge." *Duncan* v. *Louisiana*, 391 U.S. at 156. Prohibiting a judge from determining a mandatory minimum sentencing factor would not protect against either prosecutorial zealousness or judicial misfeasance. A harsh or prejudiced judge can impose a longer sentence within the already-authorized range whether or not the legislature has mandated that result. And an overzealous prosecutor can demand such a sentence, whether or not it is required. Even if a jury were to *reject* the factual predicate for the mandatory increase under the beyond-a-reasonable-doubt standard, the sentencing court would remain free to find the same fact by a preponderance of the evidence and impose the same sentence. See *United States* v. *Watts*, 519 U.S. 148, 157 (1997) (per curiam) ("a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long

as that conduct has been proved by a preponderance of the evidence").

b. *Reasonable Doubt.* Proof beyond a reasonable doubt protects the criminal defendant against erroneous deprivations of liberty and impositions of stigma. See *Apprendi*, 530 U.S. at 484; *Winship*, 397 U.S. at 363-364. A requirement of proof beyond a reasonable doubt of facts that require the sentencing judge to impose a minimum punishment would not advance that goal. As noted above, even if those facts are *not* proved beyond a reasonable doubt, the judge can impose the same stigma and deprivation of liberty if the judge finds that the facts have been proved by a preponderance of the evidence. Indeed, the judge can impose the same stigma and deprivation of liberty even if he finds those particular facts have not been proved at all.

A defendant's loss of liberty and stigma of conviction are not heightened "in the same fashion" by a judicial finding that increases the mandatory minimum as by a judicial finding that increases the statutory maximum. Pet. Br. 7, 30-32. Unlike a finding that increases the maximum authorized punishment, a finding that increases only the minimum punishment does not expose the defendant to any loss of liberty or stigma to which he was not already exposed by the jury's verdict.

c. *Grand Jury Clause.* The grand jury clause ensures that a criminal charge is "founded upon reason" and not "dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). But a grand jury cannot prevent oppressive prosecutions by declining to charge a fact that, if found, would increase only the *minimum* punishment provided by statute. The grand jury's failure to charge that fact does not prevent the prosecutor from seeking

the same or greater punishment, even in reliance on that very fact.[9]

In sum, the function of a mandatory minimum sentencing provision is to limit the discretion of the sentencing judge and thereby allow the legislature to retain greater control over the prescription of punishments. The rights to trial by jury, to proof beyond a reasonable doubt, and to a grand jury indictment are not designed to prevent the legislature from limiting the discretion of the sentencing judge. Indeed, *Apprendi* itself limited judicial discretion, by divesting the judge of the power to exceed the statutory maximum sentence authorized by the jury's verdict. The purpose of the constitutional guarantees interpreted in *Apprendi* is to protect criminal defendants from the potentially arbitrary exercise of power by prosecutors and judges. That purpose is not undermined by mandatory minimum sentencing provisions.

2. Petitioner argues (Br. 32-33) that an increase in the mandatory minimum punishment may have a more severe practical impact on the defendant than an increase in the maximum authorized punishment. He

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[9] The grand jury clause also ensures that the defendant receives notice of the charge against him. *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985). The defendant, however, does not need notice before trial of an allegation that bears only on a sentence within the authorized range of punishment. And both due process and federal law require that the defendant be notified before the judge makes the sentencing determination of any allegations that, if found, will trigger a mandatory minimum sentence. See *Oyler* v. *Boles*, 368 U.S. 448, 452 (1962) (reasonable notice and opportunity to be heard on a recidivist charge is concomitant to the right to counsel at sentencing); 18 U.S.C. 3552(d) (requiring disclosure of presentence report); Fed. R. Crim. P. 32(c) (requiring sentencing court to verify that defendant and counsel have read and discussed presentence report).

notes that the increase in the minimum deprives the defendant of the opportunity to argue for a sentence at the bottom of the otherwise authorized range, while an increase in the maximum only creates the possibility that the defendant will receive a sentence higher than the previously authorized range. He also makes the related argument (Br. 33-34) that the deprivation of that opportunity alters "rights and entitlements" in a manner that "implicates the core concerns of the due process clause." Those arguments, however, ignore the fact that "the defendant has no substantive right to a particular sentence within the range authorized by statute." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). Although *Apprendi* establishes that a defendant has a constitutional right to a jury finding beyond a reasonable doubt of any fact (other than recidivism) that exposes him to punishment beyond the otherwise applicable statutory maximum, *Apprendi* does not create any right to "the mercy of a tender-hearted judge," 530 U.S. at 498 (Scalia, J., concurring), with unlimited discretion to impose any sentence within that maximum.

C. History Casts No Doubt On The Constitutionality Of Mandatory Minimum Sentencing Factors

McMillan is also fully consistent with historical sentencing practices. The Court concluded in *Apprendi* that the historical evidence "point[s] to a single, consistent conclusion: * * * facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." 530 U.S. at 483 n.10. Notwithstanding petitioner's contrary contention (Br. 35-37), there is no comparable historical basis for according that status to facts that merely restrict the sentencing judge's discre-

tion by requiring a mandatory minimum punishment. Petitioner cannot meet his burden to show that treating those facts as sentencing factors "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 505 U.S. 437, 445-448 (1992); *Patterson* v. *New York*, 432 U.S. 197, 202 (1977).

1. Statutory provisions that require imposition of a minimum sentence without also increasing the statutory maximum did not come into general use until the twentieth century. See N. King & S. Klein, *Essential Elements*, 54 Vanderbilt L. Rev. 1467, 1474-1477 (2001). Therefore, courts in the nineteenth century were not generally "presented with the necessity of deciding whether a fact, other than prior conviction, that triggers a mandatory minimum sentence but not a higher maximum sentence, was an essential ingredient of an offense that must be pled in the indictment and proven to a jury beyond a reasonable doubt." *Id.* at 1474.

None of the decisions on which petitioner relies (Br. 35-36) involved statutes in which a fact increased only the mandatory minimum punishment. Some of the decisions involved facts that increased only the maximum penalty.[10] Others involved facts that increased both the

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[10] See *Hobbs* v. *State*, 44 Tex. 353 (1875) (fact that burglary was "effected by force" increased maximum penalty from five to ten years); *Johnson* v. *State*, 55 N.Y. 512 (1874) (fact of prior conviction increased maximum punishment for larceny from five to ten years); *Ritchey* v. *State*, 7 Blackf. 168 (Ind. 1844) (maximum fine for arson was "double the value of the property destroyed"); *Hope* v. *Commonwealth*, 50 Mass. (9 Met.) 134 (1845) (maximum prison term and fine for larceny increased based on greater value of property stolen).

minimum and the maximum.[11] One decision involved a fine that increased in direct proportion to the value of the stolen property.[12] Finally, in one decision, the fact —whether arson occurred in the daytime or at night— did not alter the penalty range, but the court was required to consider the fact in determining the appropriate punishment within the range and to punish arson in the daytime less severely. The court held that this fact was "not one of the ingredients of the crime" and did *not* have to be included in the indictment.[13]

Only one of the cases cited by Justice Thomas in his concurring opinion in *Apprendi* appears to have involved a fact that increased only the minimum penalty. That decision involved a California statute under which the defendant's prior conviction for robbery increased the minimum penalty for his subsequent robbery conviction from one year to ten years. *People* v. *Coleman*, 145 Cal. 609 (1904). A separate California statute required that the fact of the previous conviction, which was charged in the information for the subsequent offense, be found by the jury. See *id.* at 611. The court upheld the constitutionality of that procedure, but it did not hold that any principle of constitutional law required jury determination of the prior conviction. See *id.* at 611-615.

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[11] See *Garcia* v. *State*, 19 Tex. Ct. App. 389 (1885) (fact that assault was "made with a bowie-knife or dagger, or in disguise" increased penalty from two to seven years to four to fourteen years); *Lacy* v. *State*, 15 Wis. 13 (1862) (fact that arson involved dwelling house that was lawfully occupied at time of offense increased penalty from three to ten years to seven to fourteen years).

[12] See *Commonwealth* v. *Smith*, 1 Mass. (1 Will.) 245 (1804) (penalty for larceny was "treble damages" based on value of stolen goods).

[13] *Brightwell* v. *State*, 41 Ga. 482 (1871).

Indeed, one decision holds that a fact that raised the minimum (but not the maximum) penalty was *not* an element of the offense. In *People* v. *Raymond*, 96 N.Y. 38 (1884), the statute involved made a prior conviction raise only the mandatory minimum punishment for the second offense, but did not require that the prior offense be charged in the indictment or found by the jury. The court held that the "first offense was not an element of or included in the second." *Ibid.* That case stands in contrast to the New York decision cited by petitioner (Pet. 36), in which the court held that the prior conviction "must be established on the trial" because it resulted in a "more severe penalty." See *Johnson*, 55 N.Y. at 513-514; 2 N.Y. Rev. Stat. 679, § 63 (1829); *id.* at 699, § 8.2. The only way to reconcile the statements in the two cases is that *Raymond* involved an increase in only the minimum penalty while *Johnson* involved an increase in the maximum penalty.[14]

2. Petitioner also relies on a nineteenth-century treatise on criminal procedure, but the statements he cites do not address facts that increase only the mandatory minimum punishment. See Br. 37 (quoting 1 J. Bishop, *Law of Criminal Procedure* §§ 77-84, at 50-53, § 540, at 330 (2d ed. 1872)). To the extent the treatise contains any relevant discussion, it suggests that such facts need not be treated as offense elements. The treatise states that aggravating facts considered by the judge in exercising his sentencing discretion need not be included in the indictment because they "cannot

[14] Although both New York cases (like the California case) involved recidivism—which has a unique constitutional status under *Almendarez-Torres* and *Apprendi*, 530 U.S. at 487-490—that cannot explain why the court concluded only in *Raymond* that recidivism was not an element of the offense.

swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy." Bishop, *supra*, § 85, at 54.

Petitioner relies (Br. 37) on statements suggesting that "every particular thing which enters into the punishment" is an offense element, but those statements apparently use the term "punishment" as shorthand for "maximum punishment." See Bishop, *supra*, at 330; *id.* at 51, 53. Otherwise, they would mean that all statutory mitigating factors and all facts that influence a judge's exercise of his sentencing discretion must be treated as elements. That result would conflict with extensive precedent in addition to *McMillan*, *e.g.*, *Martin* v. *Ohio*, 480 U.S. 228, 233 (1987) (affirmative defense); *Patterson*, 432 U.S. at 201 (mitigating factor); *Williams*, 337 U.S. at 246 (sentencing judge's consideration of uncharged facts), and was disavowed both by the Court in *Apprendi*, see 530 U.S. at 481, 490 n.16, and by the treatise author himself, see Bishop, *supra*, at 54.

Petitioner also is not assisted by the treatise's statement that a defendant may not be subjected to "any punishment * * * in kind differing from, what the law has set down as the penalty for the particular acts alleged" in the indictment. See Pet. Br. 37 (quoting Bishop, *supra*, at 52). The reference to a penalty differing "in kind" does not mean a mandatory minimum sentence. Rather, it means a punishment qualitatively different "in kind"—for example, the death penalty rather than imprisonment. See Bishop, *supra*, at 51 ("If a man is charged with acts to which the law attaches the penalty of imprisonment, and then he is

hung for those acts, he is not punished, he is murdered.").[15]

D. Policy Considerations Do Not Favor Petitioner's Position

1. *Mandatory Minimum Sentencing Provisions Do Not Permit Circumvention Of Apprendi*

Contrary to petitioner's contention (Br. 37-40), the Court need not invalidate mandatory minimum sentencing provisions to prevent legislatures from circumventing the interrelated jury trial and reasonable doubt guarantees. When it decided *McMillan*, the Court recognized the theoretical possibility that a legislature could enact a sentencing provision to "'evade' the command[] of *Winship*." 477 U.S. at 89. The Court concluded, however, that the risk that a hypothetical legislature might adopt a mandatory minimum provision for that purpose was not sufficient to require a categorical rule barring legislatures from enacting such provisions to limit the discretion of sentencing courts. *Id.* at 91 (constitutionality of statutes will "depend on differences of degree" and should be judged on a case-by-case basis).

Petitioner incorrectly argues (Br. 45) that Section 924(c)(1)(A) involves an attempted evasion of *Winship*. That argument is based on the incorrect premise that "brandishing and discharging were treated as offense elements" under the pre-1998 version of Section

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[15] Petitioner also cites (Br. 36) a concurring opinion in *United States* v. *Reese*, 92 U.S. 214 (1875), which relies on the Bishop treatise. *Id.* at 232-233 (Clifford, J., concurring in the judgment). That case, however, did not involve the constitutionality of a mandatory minimum sentence, and there is no indication that Justice Clifford's comments were intended to address facts that increase only the required minimum punishment.

924(c)(1). Pet. Br. 46-47. Proof that a defendant brandished (or discharged) a firearm was *not* an element of the offense defined by former Section 924(c)(1). See p. 18, *supra*. Petitioner's claim is particularly unpersuasive because, under Section 924(c)(1)(A)(ii), the fact that the defendant "brandished" the weapon only increases the defendant's minimum sentence by two years.

The *Apprendi* decision significantly reduces the possibility of evasion of constitutional protections through its categorical rule that a legislature may not entrust to the sentencing judge the determination of facts that increase the maximum punishment provided by statute. The Court in *Apprendi* recognized that the rule it adopted did not foreclose every scheme that a creative legislature might theoretically devise in order to circumvent the Constitution's procedural protections. The Court concluded, however, that the *Apprendi* rule, together with "structural democratic constraints," would provide powerful protection. See 530 U.S. at 490 n.16. As the Court recognized, a legislature has a strong disincentive to "raise all statutory maximum sentences to life in prison" (Pet. Br. 38) because that scheme would expose all citizens to greater punishment than the legislature believes is proportional to the conduct that authorizes the punishment. 530 U.S. at 490 n.16. That disincentive discourages attempts to evade *Winship* by widespread use of inflexible or draconian mandatory minimums or other techniques, such as "mitigating" factors.

2. *Overturning Mandatory Minimum Sentencing Provisions Would Undermine Sentencing Reform Efforts*

A ruling rejecting the constitutionality of mandatory minimum sentences has the potential to hamper legislative experimentation with alternative sentencing reforms. Indeed, the consequences would be particularly drastic if the Court were to embrace petitioner's contention (Br. 30 n.13) that the full panoply of trial rights must attach to any fact to which the legislature has given "so much weight that it alone alters the sentencing range." See also Amicus Families Against Mandatory Minimums Foundation (FAMM) (Br. 5) ("[a]ll the distinctive features of the offender's conduct that make it criminal and which, by statute, determine the severity of the wrongdoing, ought to be proved in the same manner"). *Apprendi* did not adopt that proposition, and its acceptance would call into question the established principle that mitigating facts need not be treated as elements of the offense, see *Martin*, 480 U.S. at 233; *Patterson*, 432 U.S. at 201, a principle that the Court expressly reaffirmed in *Apprendi*. See 530 U.S. at 490 n.16; *id.* at 501 (Thomas, J., joined by Scalia, J., concurring). It would also call into question the Federal Sentencing Guidelines.

Like mandatory minimums, the Sentencing Guidelines constrain the discretion of sentencing courts in order to prevent the unfair disparities associated with indeterminate sentencing. See *Mistretta*, 488 U.S. at 365-366. The Guidelines are consistent with *Apprendi* for the same reasons that mandatory minimum sentencing factors are consistent with *Apprendi*. The Guidelines simply constrain the discretion of the sentencing court in imposing punishment within the range otherwise specified by statute and do not increase the

authorized punishment beyond the statutory maximum. See *Edwards* v. *United States*, 523 U.S. 511, 515 (1998) (citing Guidelines § 5G1.1); see also *Apprendi*, 530 U.S. at 497 n.21. The courts of appeals that have addressed the question have uniformly held that the Guidelines are constitutional under the rule adopted in *Apprendi*.[16] But extension of *Apprendi* to mandatory minimum sentencing provisions will spark a new round of litigation and could raise serious questions.

Like mandatory minimums, the sentencing ranges set by the Guidelines operate as legal constraints on the sentencing court. See *Stinson* v. *United States*, 508 U.S. 36, 42 (1993). The district court is allowed, by statute, to depart from the Guidelines only when the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b). A "sentencing court's use of an invalid departure ground is an incorrect application of the Guidelines" that requires reversal unless a "reviewing court concludes * * * that the error was harmless." *Williams* v. *United States*, 503 U.S. 193, 200, 203 (1992).

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[16] See, *e.g.*, *United States* v. *Williams*, 235 F.3d 858 (3d Cir. 2000), cert. denied, 122 S. Ct. 49 (2001); *United States* v. *Kinter*, 235 F.3d 192 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001); *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 200), cert. denied, 531 U.S. 1177 (2001); *Hernandez* v. *United States*, 226 F.3d 839, 841-842 (7th Cir. 2000); *United States* v. *Lewis*, 236 F.3d 948 (8th Cir. 2001); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1024-1027 (9th Cir. 2000); *United States* v. *Heckard*, 238 F.3d 1222 (10th Cir. 2001); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000), cert. denied, 122 S. Ct. 552 (2001).

A decision from this Court prohibiting mandatory minimum provisions unless the defendant is accorded the right to indictment, jury trial, and proof beyond a reasonable doubt would therefore raise questions about the constitutionality of the Guidelines. The Guidelines differ from provisions such as 18 U.S.C. 924(c) in at least two important respects. First, the Guidelines are not enacted by a legislature, but are promulgated by the Sentencing Commission, "an independent commission in the judicial branch of the United States." 28 U.S.C. 991(a). Thus, the Guidelines are not statutes that "bind or regulate the primary conduct of the public." *Mistretta*, 488 U.S. at 396. And the Guidelines neither require nor permit sentencing judges to depart from statutory maximums. They also permit departure from statutory minimums only as specified by other statutory provisions. See Guidelines §§ 5G1.1; 5C1.2; 18 U.S.C. 3553(e) and (f) (1994 & Supp. V 1999). The Guidelines thus do not "vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties" for crimes. *Mistretta*, 488 U.S. at 396.

Second, statutory mandatory minimum provisions generally remove sentencing courts' discretion to sentence a defendant at the lower end of the otherwise-applicable statutory range. But the Guidelines leave courts with some discretion to depart from the applicable Guidelines range, and decisions to depart are reviewable on appeal only for abuse of discretion. *Koon* v. *United States*, 518 U.S. 81, 92 (1996). These features of the Guidelines differentiate the constitutional question here from any constitutional challenge to the Guidelines.

But this Court has not held that administratively promulgated sentencing guidelines are entirely immune

from *Apprendi* principles, and it has not examined what degree of discretion to depart from the guidelines would be necessary to distinguish them from "mandatory" sentencing provisions. Indeed, in light of the generally binding character of the Federal Sentencing Guidelines, FAMM all but acknowledges (Br. 28-29) that its analysis would render the Guidelines unconstitutional unless the Court were to adopt a "[a] less rigid" interpretation of the Sentencing Reform Act, under which the guidelines were simply "one factor among many to be considered by the court."

The sentencing court's discretion to depart from the Guidelines is an important distinction, but the difference is one of degree. Contrary to petitioner's assertion (Br. 40 n.15), a statutory mandatory minimum does not "eliminate all judicial discretion to depart downward." Rather, as with the Sentencing Guidelines, district courts have discretion to impose a sentence below the mandatory minimum in certain statutorily defined circumstances. See 18 U.S.C. 3553(e) (substantial assistance departures from statutory minimum on a government motion), 18 U.S.C. 3553(f) (safety valve in drug cases); cf. Guidelines § 5K1.1 (substantial assistance departures on a government motion); Guidelines § 5C1.2 (safety valve in drug cases). Accordingly, mandatory minimum provisions are not always "mandatory"; and Sentencing Guidelines provisions do not in all cases permit departure (*i.e.*, a judge cannot depart when a case is within the "heartland" of a guideline, see *Koon*, 518 U.S. at 92-96). Drawing the constitutional line between these types of provisions, *i.e.*, deciding

how much discretion is "enough," will therefore entail close analysis.[17]

Rather than open up those questions, the constitutionality of mandatory minimum provisions should be affirmed. The constitutional tradition in this country accords the legislature broad leeway to decide both how much discretion to give sentencing judges and the mechanism to be used to constrain that discretion (including whether to use an intermediary like the Sentencing Commission). See *Mistretta*, 488 U.S. at 364, 372-373, 381. There is no need for the Court to embark on a path that may call into question legislative reform efforts intended to guide sentencing discretion and diminish unwarranted disparate treatment of similarly situated offenders. A legislative decision to treat as sentencing factors particular facts that increase only the required minimum punishment is consistent with historical tradition and threatens no constitutional values.

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[17] Petitioner observes (Br. 15 n.15) that "34 percent of all defendants sentenced under the guidelines in 2000 received a sentence lower than the recommended range." But that figure obscures that in 2000, more than one-half of those defendants (17.9%) received departures for substantial assistance. See United States Sentencing Commission, *2000 Sourcebook of Federal Sentencing Statistics* (Sourcebook) 51 (Figure G). A sentencing court may grant such a departure only on a motion by the government; in addition, a similar departure power exists from all *statutory* mandatory minimum provisions. See *Melendez* v. *United States*, 518 U.S. 120 (1996). The percentage of departures made on grounds other than substantial assistance was 17.7%. See Sourcebook at 51 (Figure G) (17% downward, .7% upward); see also U.S.S.G. Ch.1 Pt. A(4)(b) (departures on grounds not mentioned in the Guidelines are expected to be "highly infrequent").

E. Stare Decisis Supports *McMillan*'s Continuing Validity

At stake in this case is not a question of first impression, but a question that this Court resolved 16 years ago in *McMillan*. Petitioner's constitutional claim must therefore overcome the doctrine of stare decisis. Although "*stare decisis* is not an inexorable command, * * * even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (internal quotation marks omitted). "Whether or not [the Court] would agree with [*McMillan*'s] reasoning" today, "the principles of *stare decisis* weigh heavily against overruling it now." *Ibid.*; see *Hubbard* v. *United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment) (reasons for disregarding stare decisis must "go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)").

While reliance interests may be diminished with respect to some rules of criminal procedure, see *Payne*, 501 U.S. at 828, stare decisis "has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard*, 514 U.S. at 714 (internal quotation marks omitted); see *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 854-855 (1992).

In *Apprendi*, the Court noted "the likelihood that legislative decisions may have been made in reliance on *McMillan*." 530 U.S. at 487 n.13. True to that obser-

vation, Congress and state legislatures have adopted and left in place mandatory minimum sentencing provisions in reliance on the Court's ruling upholding the constitutionality of such provisions. See note 8, *supra*. Other provisions in which Congress raised both the mandatory minimum and the maximum terms were also enacted in the wake of *McMillan*. See Pub. L. No. 104-132, § 708(a), 110 Stat. 1296 (1996) (adding mandatory minimum penalties to 18 U.S.C. 844(f) and (i)); Pub. L. No. 104-208, § 121, 110 Stat. 3009-29 (1996) (codified at 18 U.S.C. 2252A); Pub. L. No. 100-690, § 6371, 102 Stat 4370 (1988) (adding mandatory minimums under 21 U.S.C. 844(a) for serious crack possession); Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2 to 3207-4 (1986) (adding mandatory minimum terms under 21 U.S.C. 841(b)). A decision overruling *McMillan* and extending *Apprendi* to mandatory minimums could "require an extensive legislative response" and would call into question thousands of sentences imposed under those provisions. It would also inundate the courts with litigation challenging various determinate-sentencing regimes.

Petitioner offers no compelling justification for the Court to invite those disruptive effects. He argues (Br. 41-44) that the decisions in *Jones* and *Apprendi* "cast serious doubt on the continuing validity of *McMillan*," and that the Court should depart from stare decisis because "further examination of the common law understanding of offense elements * * * has revealed that at common law, facts that changed the sentencing range—maximum or minimum—were regarded as elements of the offense." Those arguments, however, are simply reformulations of petitioner's arguments that *McMillan* was wrongly decided, which—even if it were true—would be insufficient justification to cast it

and stare decisis aside. Adherence to *McMillan* is the sounder course.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor be deprived of life, liberty, or property without due process of law.

2. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury of the State and district wherein the crime shall have been committed * * * and to be informed of the nature and cause of the accusation.

3. Section 924(c)(1) and (4) of Title 18, United States Code (1994 & Supp. V 1999), provides:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

> (i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on

the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

* * * * *

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.